RE JOSHUA TAN PIN PIN; EX P WILLIAM JACKS & CO (M) SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
KANG HWEE GEE J
[BANKRUPTCY NO: D8-29-10509-1989]
28 FEBRUARY 2007

BANKRUPTCY: *Discharge - Application - Whether application within s. 33(3) or s. 33(4) Bankruptcy Act 1967 - Whether bankrupt committed an offence by not submitting statement of affairs within 21 days of receiving order - Whether order for discharge could be made*

This was the bankrupt's appeal against the dismissal of his application for a discharge under s. 33(1) of the Bankruptcy Act 1967 ('the Act'). The application was opposed by the creditors who argued that the bankrupt had committed an offence by not filing his statement of affairs within 21 days from the date of the receiving order as provided under s. 16(2)(b) of the Act. Hence, it was argued that s. 33(4) of the Act was applicable and the order for discharge could not be made.

Held (allowing the appeal):

(1) Section 33(4) of the Act is applicable only if the bankrupt had been 'convicted' of a bankruptcy offence. In the present case, the Official Assignee ('OA') had merely made an observation that the said offence had been committed but the bankrupt was not charged with the offence nor did the OA deem it fit to institute any contempt proceedings against him. It followed that the application for discharge should be considered under s. 33(3) of the Act where the discretion of the court was fettered only by the consideration of equity, fairness and good conscience. (para 6)

(2) It was appropriate that the court make an order under s. 33(3) of the Act, either to discharge the bankrupt absolutely or with conditions, on the following considerations: (i) he had been a bankrupt for the past 14 years; (ii) he had been contributing RM200 per month for the past 10 years for the benefit of his creditors; (iii) he was now 47 years of age; and (iv) it was unlikely that he would be able to improve his financial earning anymore than the salary of RM2200 per month he was currently earning. (para 6)

(3) A release from the grip of bankruptcy would under the circumstances afford the bankrupt the opportunity to improve his earnings free from the bondage of his creditors. Should he be able to improve his earnings within the short remaining productive period of his employment then it would be appropriate that he be made to spare some of it to repay his creditors. (para 6)

[Should JD's taxable income reach RM120,000 per year within the next 10 years he should pay a sum of RM300,000 for the benefit of his creditors payable through the OA in such a manner that the OA might determine. JD should submit a copy of his income tax returns to OA on a yearly basis. Thereafter after the payment, he should be released from his debt.]

Case(s) referred to:

Re Mohana Sundari M Subramaniam; ex p United Prime Corporation Bhd [2004] 1 CLJ 624 HC ***(refd)***

Re Kelvin Lee See Fooi; ex p BSN Commercial Bank Malaysia Berhad [2006] 6 CLJ 65 HC ***(refd)***

Re Siah Ooi Choe; ex p Hongkong and Shanghai Banking Corporation [1998] 1 SLR 903 ***(refd)***

Legislation referred to:

Bankruptcy Act 1967, ss. 16(1), (2)(b), 33(1), (3), (4), (6)(m)

Other source(s) referred to:

IF Fletcher, *Law of Bankruptcy*, p 291

For the bankrupt - Thaiyub Khan; M/s Thaiyub Khan Othuman & Co

For the creditor (OCBC Bank Berhad) - Ma Tien Yuan; M/s Shook Lin & Bok

For the creditor (Allianz General Insurance Malaysia Berhad) - SM Chen; M/s Anad & Noraini

Asrul Nizam; Department of Insolvency

Reported by Usha Thiagarajah

A

JUDGMENT

Kang Hwee Gee J:

This is my oral judgment: ***(ex-tempore)***

B **[1]** This is an appeal against the decision of the Senior Assistant Registar in dismissing the bankrupt's application to be discharged from bankruptcy under s. 33(1) of the Bankruptcy Act 1967. Section 33(1) read as follows:

C > A bankrupt may at any time after being adjudged bankrupt apply to the court for an order of discharge, and the court shall appoint a day for hearing the application.

[2] The grounds relied upon by the bankrupt in making the application before the Senior Assistant Registrar are as follows:

D

1. RO and AO were made against the bankrupt on 27 August 1992 – some 14 years ago.
2. At the time the orders were made he was merely 33 years old.
3. The debt arose from a letter of guarantee in respect of the grant of credit facility in the supply of goods to his company of which he was a director.
4. At the time of executing this guarantee he was merely 27 years old.
5. By the time the meeting of creditors was convened by the Official Assignee, the total provable debt of the bankrupt came to approximately RM5,749,105.98.
6. The guarantee was executed by the bankrupt on the behest of his father who was at that time controlling the company which was granted the facility.
7. The sum of RM5,749,105.98 was in respect of all the guarantees he executed for the benefit of the company.
8. The bankrupt has just completed his studies in Engineering from a university in U.K.

E F G H I

9. The company suffered losses during the late 1980's economic downtown.

10. The bankrupt has 16 creditors but only four creditors came forward to oppose his application for discharge before the Senior Assistant Registrar. The total debt owed to the four creditors is approximately RM2.8 million.

11. Two third of the creditors, who were owed two third of the debt still remaining unpaid, did not oppose the application.

12. In the case of *Re Mohana Sundari M. Subramaniam ex p United Prime Corporation Bhd* [2004] 1 CLJ 624 per Zulkefli Ahmad Makinudin J at Held (1), (3) and (4):

> [1] Section 33(1) of the Act allows a discharge from bankruptcy. The fact that there is such a provision in the Act shows that it is intended that a bankrupt has some form of relief. The Act also expressly lays down certain guidelines when considering the discharge application. These guidelines if viewed as a whole show that the Act was designed to meet two major conflicting concerns. On the one hand that it will be undesirable to let those who become bankrupt off the hook if they have brought about their bankruptcy by dishonest business dealings, rash and extravagance in living and if they have conducted their business affairs to the detriment of their creditors. On the other hand, it will be in the interests of society and commercial morality that people who have become a bankrupt through little fault of their own but by just being caught at the wrong turn of the economic cycle be given a second chance in life. Further, the new s. 33A of the Act allows a bankrupt to apply to the OA directly to obtain his discharge after only five years of being a bankrupt. This new section is designed and enacted by Parliament in furtherance of their original intention to afford a bankrupt some relief. (p 628 e-h)
>
> [3] The OA's report certified that the JD was not guilty of any of the matters prohibited by the Act. Her conduct was exemplary and she gave fullest co-operation to the authorities administering her bankruptcy. By virtue of s. 33(8) of the Act, the OA's report was *prima facie* proof of the matters contained therein and this evidence had not been rebutted. (p 630 f)

A [4] The JD was only 25 years old when she was asked by her father to sign the guarantees that resulted in her bankruptcy. Being only 25 years of age, her father must have influenced her into signing them. These extenuating circumstances had placed her in an unusually adverse position. She was not in control of the company her father had incorporated in which she and her siblings were made directors of the company. She and her siblings had signed the guarantees at the behest of their father. This bankruptcy was thrust upon her through little fault of her own. (p 630 h)

C Submits: This is a proper case to relieve the bankrupt from the bond of the Official Assignee as the circumstances obtained is similar to the circumstances in *Re Mohana Sundari.*

D The Official Assignee had no objection to the bankrupt's application for discharge and has filed a report to this court which read as follows:

DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR (BAHAGIAN DAGANG)

E DALAM PERKARA KEBANKRAPAN NO. 10509-1989

Ber : Joshua Tan Pin Pin
No. 1, Jalan Setia Kasih Lapan
Bukit Damansara
F Kuala Lumpur

DAN

Ex-Parte : Public Bank Bhd.

G LAPORAN KETUA PENGARAH INSOLVENSI MALAYSIA DI BAWAH SEKSYEN 33(3) AKTA KEBANKRAPAN 1967

Ketua Pengarah Insolvensi Malaysia dalam perkara di atas melaporkan kepada Mahkamah seperti berikut:

H 1. Perintah Penerimaan dan Perintah Penghukuman telah dibuat terhadap Joshua Tan Pin-Pin beralamat di No. 32, Jalan Tengku Ampuan, Taman Duta, Kuala Lumpur oleh Mahkamah Tinggi Kuala Lumpur pada 27.8.1992 di atas permohonan William Jacks & Co. (Malaysia) Sdn. Bhd.

I 2. Pada 6.5.1997 sibankrap telah memfailkan Pernyataan Hal Ehwal dengan mengemukakan jumlah liabiliti sebanyak RM5,004,121.00 yang terhutang kepada sepuluh (10) pemiutang tidak bercagar seperti berikut:

1.	William Jacks & Co. (Malaysia) Sdn. Bhd.	RM1,932,742.99
2.	Malaysian British Assurance Bhd.	RM1,402,866.78
3.	HSBC Bhd.	RM22,106.78
4.	HSBC Bhd.	RM812,652.16
5.	Overseas Chinese Banking Corp.	RM134,461.81
6.	Sin Hup Guan Piling Co.	RM104,744.70
7.	Rakyat Merchant Bankers Bhd.	RM518,660.47
8.	Sam Fo Holdings Sdn. Bhd.	RM10,161.79
9.	Posim Berhad.	RM56,230.44
10.	Credit Corp (M) Bhd.	RM9,493.08

3. Pada 21.2.2006, sibankrap telah memfailkan Pernyata Hal Ehwal Terpinda dengan mengemukakan jumlah liabiliti sebanyak RM5,749,105.98 yang terhutang kepada enam belas (16) pemiutang tidak bercagar seperti berikut:

1.	William Jacks & Co. (Malaysia) Sdn. Bhd.	RM1,932,742.99
2.	Malaysian British Assurance Bhd.	RM1,402,866.78
3.	HSBC Bhd.	RM22,106.78
4.	HSBC Bhd.	RM812,652.16
5.	Overseas Chinese Banking Corp.	RM134,461.81
6.	Sin Hup Guan Piling Co.	RM104,744.70
7.	Rakyat Merchant Bankers Bhd.	RM518,660.47
8.	Sam Fo Holdings Sdn. Bhd.	RM10,161.79
9.	Posim Berhad.	RM56,230.44
10.	Credit Corp (M) Bhd.	RM9,493.08
11.	Hong Leong Finance Bhd.	RM215,543.24
12.	Cedes Car Care Centre	RM20,959.00
13.	Commercial Union Assurance (M) Sdn. Bhd.	RM201,409.07
14.	Wilayah Credit Sdn. Bhd.	RM113,460.33
15.	Oriental Bank	RM140.54
16.	Selangor Industrial Corp Sdn. Bhd.	RM213,796.40

Tiada aset dikemukakan.

4. Mesyuarat Pertama Pemiutang-Pemiutang telah diadakan pada 30.10.2000. Terdapat 1 pemiutang iaitu Sin Hup Guan Piling Co. Tiada resolusi diluluskan dan mesyuarat ditamatkan pada hari yang sama. Sibankrap secara sukarela membayar RM200.00 sebulan mulai 1.4.1997. Pemeriksaan Awam telah diadakan pada 23.4.2001 dan ditamatkan pada hari yang sama.

5. Setakat ini terdapat enam belas (16) bukti hutang telah diterima terhadap estet sibankrap. Tuntutan yang diterima dan diperakui untuk tujuan pengisytiharan dividen adalah seperti berikut:

Pemiutang	Jumlah Tuntutan (RM)	Jumlah Diperakui (RM)	Jumlah Dividen (0.93%) (RM	Baki Hutang (selepas dividen) (RM)
1. William Jacks & Co. (Malaysia) Sdn. Bhd.	1,932,742.99	1,627,678.03	15,137.40	1,612,540.62
2. Malaysian British Assurance Bhd.	1,402,866.78	1,218,242.90	11,329.65	1,206,913.24
3. Hong Leong Finance Bhd.	215,543.24	152,768.02	1,420.74	151,347.27
4. HSBC Bank	22,106.78	21,150.00	196.70	20,953.30
5. HSBC Bank	812,652.16	812,652.16	7,557.66	805,094.49
6. Overseas Chinese Banking Corp.	134,4611.81	120,909.60	1,124.45	119,785.14
7. Cedes Car Care Centre	20,959.00	20,959.00	194.91	20,764.08
8. Sin Hup Guan Piling Company	104,744.70	104,744.70	974.12	103,770.57
9. Rakyat Merchant Bankers Bhd.	518,660.47	518,660.47	4,823.54	513,836.92
10. San Fo Holidays Sdn. Bhd.	10,161.79	10,161.79	94.50	10,067.28
11. Posim Berhad	56,230.44	50,126.80	466.18	49,660.62
12. Credit Corporation (M) Bhd.	9,493.08	9,493.08	88.28	9,404.79
13. Commercial Union Assurance (M) Sdn. Bhd.	201,409.07	201,409.07	1,873.10	199,535.96
14. Wilayah Credit Sdn. Bhd.	113,460.33	113,460.33	1,055.18	112,405.14
15. Oriental Bank Bhd.	140.52	140.52	1.30	139.21
16. Selangor Industrial Corporation Sdn. Bhd	213,796.40	213,796.40	1,988.30	211,808.09

6. Pada masa kini baki kredit sibankrap adalah sebanyak RM56,377.88. Jumlah tersebut adalah mencukupi untuk mengisytiharkan dividen sebanyak 0.93% kepada enam belas (16) pemiutang yang telah diperakui tuntutan mereka dan juga mencukupi untuk membayar kos pentadbiran dan perbelanjaan dalam kebankrapan ini.

7. Sibankrap kini berusia 47 tahun dan masih bujang. Beliau kini bekerja sebagai Pengurus Pemasaran dengan pendapatan sebanyak RM2,200.00 sebulan.

8. Sebab-sebab beliau diisytiharkan bankrap adalah beliau menjadi penjamin kepada Syarikat Pembinaan Dintan Sdn. Bhd. di mana beliau adalah Pengarahnya.

9. Sepanjang pengetahuan Ketua Pengarah Insolvensi, sibankrap tidak melakukan kesalahan di bawah Akta Kebankrapan, 1967 atau Seksyen 421, 422, 423 dan 424 Kanun Keseksaan dan tiada bukti telah dikemukakan tentang fakta-fakta yang dinyatakan di dalam Seksyen 38 dan 109 Akta Kebankrapan, 1967.

10. Notis permohonan sibankrap untuk pelepasan telah dihantar dengan pos berdaftar kepada pemiutang yang telah mengemukakan bukti hutang pada 16.3.2006 dan afidavit pengeposan tersebut telah diikrarkan pada 20.3.2006.

Bertarikh: 24.8.2006

t.t.

(SITI NORLIA BT. MOHD. DOM)
b.p. Pengarah Insolvensi Negeri
Cawangan Wilayah Persekutuan
b.p. Ketua Pengarah Insolvensi, Malaysia

Presently the Official Assignee is of the view that since the amount of debt remaining unpaid is so large it is unlikely that the bankrupt could settle it given that he had been making payment for the last ten years.

[3] The application is opposed by the creditors present at the hearing of this application jointly as follows:

1. The bankrupt has committed an offence by not filing his statement of affairs within 21 days from the date of the receiving order as provided in s. 16(2)(b) of the Bankruptcy Act. The Official Assignee's report confirmed that the

statement of affairs was filed only on 6 May 1997 some five years after the date of the receiving order. The bankrupt can only be discharged upon this offence being committed if the dividend declared to be paid to creditors shall be not less than 50% under s. 33(4) of the Bankruptcy Act 1967, his asset in this case being less than 50% of his debt.

2. Under the same section the court shall not grant the order until a dividend of 50% had been paid to the creditors.

3. The Official Assignee's report is insufficient to justify bankrupt's application for discharge. Section 33(3) of the Act provides that the court has to take into consideration the Official Assignee's report. In the instant case the Official Assignee's report does not disclose whether the bankrupt has any other means of income to contribute. There is also no indication of the bankrupt's monthly expenses.

[4] Reply By Counsel For The Bankrupt

1. Under Section 16(1) "committed" means convicted of a bankrupcy offence. See I.F. Fletcher in *Law of Bankruptcy* p. 291:

> Moreover, the words "has committed", occurring in that part of s. 26(2), have been held to mean that the bankrupt must have been tried and convicted of a criminal offence by some duly qualified court before the time of his application for his discharge. The Bankruptcy Court itself has no jurisdiction to try a criminal matter, but is restricted to trying whether the bankrupt has committed any of the so-called "bankruptcy offences" listed in s. 26(3), whose commission also has the effect of rendering the case a "special" one."

2. On the question of dividend must be not less than 50% - court has a discretion in respect of one of the four types of Order listed in the provisos to s. 33(4) but if comes under sub-s. 4 then court has full discretion under sub-s. 3 to grant or refuse an absolute order of discharge, or suspend the operation of the order for a specified time, or grant an order of discharge subject to any condition with respect to any earnings of income which may afterwards become due to the bankrupt or in respect to his after acquired property.

3. Further for the purpose of interpreting s. 33(6)(m) the court should consider that the bankrupt's debt arose from the guarantees he signed and should not therefore be blameable. The assets had not exceeded 50% as the liabilities arose mainly from the guarantees he signed. See Singapore case by Warren L.H. Khoo J. in *Re Siah Ooi Choe, ex p Hongkong and Shanghai Banking Corporation* [1998] 1 SLR 903 – guarantees signed held bankrupt not blameable, therefore proviso sub-s. 6 applies.

[5] Reply By The Creditors' Counsel

See *Re Kelvin Lee See Fooi, ex p BSN Commercial Bank Malaysia Berhad* [2006] 6 CLJ 65 per Vincent Ng J. held failure to submit statement of affairs within 21 days constitutes an offence of contempt of court. Hence the bankrupt in this case in failing to submit his statement of affairs within 21 days as reported in the Official Assignee's report constitutes contempt in court which is an offence which should put his case squarely within s. 33(4).

[6] Findings And Decision

1. It is first necessary to decide whether this application for discharge should be dealt with under s. 33(3) or s. 33(4).

2. Section 33(3) – if the bankrupt has not committed any bankruptcy Offence; and s. 33(4) – if he had committed a bankruptcy offence in which case the court may not be able to make an order for discharge unless he had paid at least 50% of his debt to his creditors.

3. Having heard the submission of the counsel present I would accept the submission of the petitioner's counsel that s. 33(4) is applicable only if the bankrupt had been "convicted" of a bankruptcy offence. It is clear that in this case the bankrupt had merely been observed by the Official Assignee to have committed the offence of having failed to submit his statement of affairs within 21 days. He has not been charged with any offence and the Official Assignee had not deemed it fit to institute any contempt proceeding. This application for discharge should therefore be considered under s. 33(3) where the discretion of the court is fettered only by the consideration of equity, fairness and good conscience.

4. The purpose of declaring a person a bankrupt is to enable essentially the court in an organised society to regulate the financial affairs of an insolvent debtor who would otherwise be at the mercy of his creditors. During the pendency of his bankruptcy the debtor would be protected from extra bankruptcy action of his creditors.

5. Equity, fairness and good conscience however dictate that a bankrupt should not be under bondage for his entire life. Where it is clear that he would not be able to discharge his debt in full or to any appreciable degree it would be the duty of this court to make such order under s. 33(3) as deemed proper.

6. Considering that:

(i) the judgment debtor had been a bankrupt for the past 14 years;

(ii) he had been contributing RM200 every month for the past ten years for the benefit of his creditors;

(iii) he is now 47 years of age; and

(iv) it is unlikely that he would be able to improve to any appreciable degree, his financial earning anymore than the salary of RM2200 per month that he is now earning;

it is appropriate that this court makes an order under s. 33(3) either to discharge him absolutely or with conditions.

7. A release from the grip of bankruptcy would under the circumstances afford the bankrupt the opportunity to improve his earnings free from the bondage of his creditors. Should he be able to improve his earnings within the short remaining productive period of his employment then it would be appropriate that he then be made to spare some of it to repay his creditors.

8. An appropriate order under the circumstances is an order that he be discharged forthwith from bankruptcy. There shall be a further order that should his taxable income reach RM120,000 per year within the next ten years he should pay a sum of RM300,000 for the benefit of his creditors payable through the Official Assignee in such manner that the Official Assignee

may determine. He is obliged to submit a copy of his income tax returns to the Official Assignee on a yearly basis. Thereafter after the payment, he should be released of his debt.

9. The appeal is allowed but there shall be no order as to costs of this application.